

FEDERAL CIRCUIT COURT OF AUSTRALIA

DHANUKA & ANOR v MINISTER FOR IMMIGRATION [2019] FCCA 2849
& ANOR

Catchwords:

MIGRATION – Judicial review – decision of former Migration Review Tribunal – decision to affirm refusal by a delegate to grant Regional Employer Nomination visa – whether decision affected by jurisdictional error.

Legislation:

Federal Circuit Court of Australia Act 1999 (Cth), s.75

Migration Act 1958 (Cth), ss.65, 98,101, 359A, 359AA, 476

Migration Regulations 1994 (Cth), sch.2, cl.187.213, sch.4, cl.4020

Cases cited:

Awadallah v Minister for Immigration & Border Protection & Anor [2015] FCCA 3126

Gill v Minister for Immigration & Border Protection [2016] FCAFC 142; (2016) 248 FCR 398; (2016) 162 ALD 286

Lin v Minister for Immigration & Citizenship & Anor [2009] FCA 494; (2009) 176 FCR 371

Minister for Immigration & Citizenship v Li & Anor [2013] HCA 18; (2013) 249 CLR 332; (2013) 87 ALJR 618; (2013) 297 ALR 225; (2013) 138 ALD 181

Minister for Immigration & Citizenship v Singh [2014] FCAFC 1; (2014) 231 FCR 437; (2014) 308 ALR 280; (2014) 139 ALD 50

Minister for Immigration & Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611; (2010) 84 ALJR 369; (2010) 266 ALR 367; (2010) 115 ALD 248

Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323; (2001) 75 ALJR 1105; (2001) 180 ALR 1; (2001) 62 ALD 225

Minister for Immigration & Citizenship v Applicant A125 of 2003 [2007] FCAFC 162; (2007) 163 FCR 285; (2007) 243 ALR 691

Paul v Minister for Immigration & Multicultural Affairs [2001] FCA 1196; (2001) 113 FCR 396; (2001) 64 ALD 289

Plaintiff S157/2002 v The Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476; (2003) 77 ALJR 454; (2003) 195 ALR 24; (2003) 72 ALD 1

Re Minister of Immigration, Local Government & Ethnic Affairs v Roberts (1993) 41 FCR 82 *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189; (2007) 81 ALJR 1401; (2007) 237 ALR 64

Sran v Minister for Immigration & Anor [2014] FCCA 37; (2014) 283 FLR 391

SZJUB v Minister for Immigration & Citizenship [2007] FCA 1486

SZTGV v Minister for Immigration & Border Protection [2015] FCAFC 3;
(2015) 229 FCR 90; (2015) 318 ALR 450; (2015) 144 ALD 525
Trivedi v Minister for Immigration & Border Protection [2014] FCAFC 42;
(2014) 220 FCR 169; (2014) 141 ALD 252
Upjohn v Illingworth (1982) 29 SR (NSW) 4
VWBF v Minister for Immigration & Multicultural & Indigenous Affairs [2006]
FCA 851; (2006) 154 FCR 302
Vyas & Anor v Minister For Immigration & Anor [2012] FMCA 92; (2012) 263
FLR 131

First Applicant:	RASHMI DHANUKA
Second Applicant:	KARAN KIRIT KAPASI
First Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES & MULTICULTURAL AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	PEG 242 of 2015
Judgment of:	Judge Antoni Lucev
Hearing date:	18 April 2016
Date of Last Submission:	27 October 2017
Delivered at:	Sydney (via video-link to Perth)
Delivered on:	8 October 2019 (and delivered by video-link by Judge Street pursuant to s.75 of the <i>Federal Circuit Court of Australia Act 1999</i> (Cth))

REPRESENTATION

Counsel for the Applicants:	Mr D Blades
Solicitors for the Applicants:	Munro Doig
Counsel for the Respondents:	Mr P R Macliver
Solicitors for the Respondents:	Sparke Helmore

ORDERS

- (1) That the name of the first respondent be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
- (2) That the application filed 5 June 2015, as amended on 4 November 2015, be dismissed.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 242 of 2015

RASHMI DHANUKA

First Applicant

KARAN KIRIT KAPASI

Second Applicant

And

**MINISTER FOR IMMIGRATION, CITZENSHIP, MIGRANT
SERVICES & MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicants filed an application for judicial review pursuant to s.476 of the *Migration Act 1958* (Cth) (“*Migration Act*”) seeking review of a decision of the then Migration Review Tribunal, now Administrative Appeals Tribunal (“Tribunal Decision” and “Tribunal” respectively). The Tribunal Decision affirmed a decision of a delegate (“Delegate’s Decision” and “Delegate” respectively) of the first respondent, the then Minister for Immigration and Border Protection, now the Minister for

Immigration, Citizenship, Migrant Services & Multicultural Affairs (“Minister”), to refuse the applicants a Regional Employment Nomination (Permanent) visa (“REN Visa”).

2. The first applicant, Rashmi Dhanuka (“Ms Dhanuka”), was the primary applicant for the REN Visa. The second applicant, Karan Kirit Kapasi (“Mr Kapasi”) was Ms Dhanuka’s de-facto partner and a “secondary applicant” for the REN Visa.
3. The Court acknowledges that these Reasons for Judgment have been significantly delayed. The essential reasons for that are the case load in the Perth Registry of this Court over several years, which, in November 2017, was described by the Federal Court as “extreme”, and the judicial resourcing of the Perth Registry of this Court which was described by the Federal Court as “under resourced”: *WZASX v Minister for Immigration & Border Protection* [2017] FCA 1415 at [32] per McKerracher J, with all of the case management, and other, consequences and effects both obvious and not obvious that flow therefrom. In relation to this case it is pertinent to note that the Court has had access to and read all of the relevant papers, including the following:
 - a) the originating application filed 5 June 2015, and an amended originating application filed 4 November 2015;
 - b) the response filed 19 June 2015;
 - c) the Court Book (“CB”) of relevant materials, including the Tribunal Decision at CB 445-453, which was tendered and marked as Exhibit 1 at the hearing;
 - d) the affidavits of the applicant filed 5 June 2015 and William Bowie McDonald filed 4 November 2015 (“Bowie Affidavit”);
 - e) the applicants’ outlines of submissions filed 21 March 2016 and 22 September and 27 October 2017;
 - f) the Minister’s outlines of submissions filed 11 April 2016 and 13 October 2017; and
 - g) a transcript of the hearing from 18 April 2016 (“Transcript”).

4. Further, there was no oral witness evidence or examination at the final hearing of the matter. In the above circumstances, the delay, which the Court very much regrets, has had no effect upon the Court's reasoning in these Reasons for Judgment. These Reasons for Judgment are being delivered by video-link by Judge Street pursuant to s.75 of the *Federal Circuit Court of Australia Act 1999* (Cth).

Background

5. The background to the Tribunal Decision is as follows:
- a) the applicants are both citizens of India and in a de-facto relationship: CB 2, 4 and 38. Ms Dhanuka first arrived in Australia on a student visa in 2008: CB 103;
 - b) on 5 November 2012 with the assistance of a migration agent, the applicants lodged an application for the REN Visa: CB 1-17 whereby Ms Dhanuka was nominated for the position of a jewellery designer: CB 19. Accompanying the REN Visa application was a Diploma in Jewellery Design & Production ("Diploma") issued from India: CB 18;
 - c) on 15 May 2013 the Delegate invited the applicants to comment on or respond to information, namely that the Diploma was a bogus document and that the Public Interest Criterion 4020 ("PIC 4020") of sch.4 to the *Migration Regulations 1994* (Cth) ("*Migration Regulations*") may not be satisfied in light of this: CB 266-270;
 - d) as a result of the invitation to comment the applicants, on the advice of their migration agent, withdrew the REN Visa application on 10 June 2013: CB 271-273 and 399-401;
 - e) on 29 July 2013 the applicants reapplied for a REN Visa and the Diploma was again, it appears to be accepted inadvertently, included in the and formed part of the materials accompanying the REN Visa application: CB 22-37 and 49;
 - f) on 21 January 2014 the Delegate wrote to the applicants and invited them to comment on the Diploma and again referred to PIC 4020: CB 144-147;

- g) on 3 February 2014 the applicants' migration agent responded to the invitation to comment advising that the Diploma was a "bogus document" though in a statement from Ms Dhanuka and the migration agent it was explained that it was included in the application as a result of "manual error" and an "unintentional technical error made by a staff member": CB 150-151 and 153-156. Also included in the response was a "Notification of incorrect answer(s)" form and a letter of support from her employer: CB 150-158;
- h) on 21 March 2014 the Delegate's Decision was to refuse the REN Visa on the basis that the applicants failed to satisfy PIC 4020 as the applicants had provided a "bogus document": CB 160-171;
- i) the applicants sought review of the Delegate's Decision on 7 April 2014: CB 172-162. The applicants were represented by the same migration agent who had previously represented them before the Delegate (and was responsible for the Diploma inadvertently being provided to the Delegate);
- j) on 19 January 2015, the applicants appointed a new migration agent to act on their behalf and at the request of the newly appointed migration agent the before the Tribunal hearing was postponed until 15 March 2015: CB 202-208. In the response to Tribunal hearing invitation the applicants indicated they wished for the Tribunal to call three witnesses at the hearing: CB 212-214;
- k) on 11 March 2015 the migration agent forwarded written submissions and a large number of documents including four statutory declarations with accompanying annexures: CB 217-351;
- l) on 13 March 2015 the migration agent forwarded a further document to the Tribunal, being a letter relevant to Ms Dhanuka's employment: CB 352-355;
- m) the applicants attended a hearing on 16 March 2015 before the Tribunal ("Tribunal Hearing") with the assistance of their

migration agent, and the Tribunal also heard evidence from the applicants and two witnesses: CB 433-436;

- n) on 31 March 2015 the migration agent forwarded written submissions directed toward PIC 4020 arguing that the applicants had not “given or caused to be given” a bogus document: CB 438-441; and
- o) on 11 May 2015 the Tribunal affirmed the Delegate’s Decision to refuse the REN Visa.

Tribunal Decision

6. In the Tribunal Decision, the Tribunal:

- a) outlined the background to the application including that the basis of the Delegate’s refusal was that the applicants did not meet PIC 4020: CB 446 at [1]-[4];
- b) identified that the issue in the review was whether the applicants satisfied PIC 4020 and broadly summarised the elements of the criterion, including noting that the Tribunal had the discretion to waive the criterion if there were “compelling or compassionate reasons justifying the grant of the visa”: CB 446-447 at [6]-[7];
- c) summarised the legal principles applicable to PIC 4020 with reference to case law and the sub-clauses of the provisions: CB 447 at [8]-[10];
- d) found that the Diploma was a “bogus document” as that term is defined by the *Migration Act*, on the basis that the applicants had admitted it: CB 447 at [11];
- e) noted the circumstances in which it was said the Diploma was provided to the Delegate, namely that the applicants’ former migration agent was under instruction from Ms Dhanuka not to include the Diploma in the application however, it was provided and false information on Ms Dhanuka’s level of qualifications was also included as an employee of the former migration agent accidentally included the bogus document and false information when submitting the application and the error was only realised

when the applicants received an invitation to comment in January 2014: CB 447 at [13];

- f) accepted the Diploma was sent accidentally and it was not the intention that the bogus document be referred to in the application as, logically, the applicants and migration agent would not re-submit an application with the same documents that were previously identified as “bogus” and that caused the applicants to withdraw their previous application: CB 447-448 at [14];
- g) was of the view that the fact remained that the Diploma was submitted with the application, and therefore concluded the bogus document was submitted to the Delegate due to an error by an employee of the former migration agent and the former migration agent and applicants indifference as to the “correctness of the application”: CB 447-448 at [14];
- h) referred to the applicants’ migration agent submitting that as the applicants did not physically provide the Diploma to the Delegate and they instructed the former migration agent not to include the Diploma, they had not “caused to be given” a bogus document and their former migration agent acted outside of their authority: CB 448 at [15];
- i) found the applicants gave authority to the former migration agent to lodge the REN Visa application, which was a broad scope of authority, and that Ms Dhanuka was not ‘indifferent’ to what was to be included in, but was ‘indifferent’ to what was in fact included and did not review the REN Visa application before it was lodged: CB 448 at [16];
- j) concluded that, even accepting the inclusion of the Diploma was a mistake, the bogus document was given or caused to be given to the Delegate as the Tribunal could not be positively satisfied that that was not the case, therefore the applicants did not meet PIC 4020: CB 448 at [17]-[18];
- k) turned to consider whether there were “compelling or compassionate reasons” to waive PIC 4020, specifically if there were compelling circumstances that affected the interests of

Australia, or if there were compassionate or compelling circumstances that affect the interests of an Australian citizen that justified the granting of the REN Visa: CB 448 at [19]-[20];

- l) referred to the applicants' assertion the compelling circumstances that affect the interests of Australia and justify the grant of the REN visa was that Ms Dhanuka's employer would be adversely affected if she has to leave, and that this would amount to Australia's trade or business opportunities being adversely affected: CB 448 at [21];
- m) detailed the circumstances of Ms Dhanuka's employer and her employment, including the evidence of the executive chairman that if Ms Dhanuka were required to leave he would need to spend two years training another employee, though the business would not stop if this was the case: CB 448-449 at [22]. The Tribunal noted that the business "will go on without [the] applicant", that there were two people in the organisation who also have the skill and experience of Ms Dhanuka, that at the time of training Ms Dhanuka she held only a temporary visa and the employer made the decision to train Ms Dhanuka notwithstanding this, and finally that the business employs 18 other jewellers who could "surely" be upskilled: CB 449 at [23];
- n) was not persuaded that the loss of Ms Dhanuka to the business was a compelling circumstance as the loss of employees, even highly skilled employees like Ms Dhanuka, was an ordinary aspect of running a business much like the ongoing need to hire and train new employees and grow: CB 449 at [24];
- o) further noted that even if it was persuaded the importance of Ms Dhanuka remaining in the business amounted to a compelling circumstance, it would still not amount to a compelling circumstance affecting the interests of Australia as the Tribunal was not satisfied that the business would be so adversely affected by the loss of Ms Dhanuka that the Argyle diamond trade would be affected, nor would there be an adverse effect on Australian trade or which would otherwise affect the interests of Australia: CB 449 at [24];

- p) referred to Ms Dhanuka's claim that her sister would be adversely affected if she were to leave as her sister relies on Ms Dhanuka for emotional and financial support and has separated from her husband, though in the past Ms Dhanuka's sister has relied on Ms Dhanaku for financial and emotional support "from afar" and this can continue if Ms Dhanuka is offshore and Ms Dhanuka's sister still had her brother for support in Australia therefore this was not a compelling or compassionate circumstance: CB 449-450 at [25]-[28];
- q) was not satisfied that Ms Dhanuka's brother's financial reliance on Ms Dhanuka was a compelling or compassionate circumstances, nor his emotional reliance on Ms Dhanuka as his "older sister": CB 450 at [30];
- r) acknowledged that Ms Dhanuka and her siblings have enjoyed having each other's support in Australia, however this does not amount to a compassionate or compelling circumstance: CB 450 at [31];
- s) noted the migration agent's submission that the relevant policy was that when decision-makers are considering the compelling and compassionate circumstances presented by an applicant they need to weigh the severity of the fraud. The Tribunal was of the view that if the nature of the fraud is to be taken into account when assessing the compelling or compassionate circumstances raised then it would not be in favour of Ms Dhanuka as the nature of the fraud was serious given Ms Dhanuka had fabricated a qualification, withdrew the REN Visa application only when caught and, even accepting that the second time around the provision of the Diploma was unintentional, it did not negate the very existence of the bogus document was attributable to a fraudulent action and attempt to deceive by Ms Dhanuka in the previous application: CB 450 at [32];
- t) considered each of the matters raised by the applicants, both singularly and cumulatively, and was not satisfied that there were compelling circumstances that affect the interests of Australia, or that there were compassionate or compelling circumstances that

affect the interests of an Australian citizen that would justify waiving PIC 4020 to grant the REN Visa; and

- u) the Tribunal affirmed the Delegate's Decision not to grant the REN Visa as the applicants did not satisfy PIC 4020 which was a requirement of cl.187.213 of sch.2 to the *Migration Regulations*.

Judicial Review Application

7. The applicants filed an amended judicial review application on 4 November 2015 containing 10 grounds of review ("Amended Judicial review Application"). In the applicants' written submissions dated 21 March 2016, the applicants indicated they pressed only four grounds of the amended judicial review application.
8. The applicants relied on, and there was no objection to the Court reading, the MacDonald Affidavit which annexed a copy of the transcript of the hearing before the Tribunal on 16 March 2015 ("Tribunal Transcript").
9. Following the Court reserving judgment, the Full Court of the Federal Court delivered judgment in the matter of *Gill v Minister for Immigration & Border Protection* [2016] FCAFC 142; (2016) 248 FCR 398; (2016) 162 ALD 286 ("*Gill*"). On 18 September 2017, the Court made orders by consent allowing each party to file further written submissions addressing *Gill* and the parties filed submissions accordingly.

Consideration

Jurisdictional error required

10. The Tribunal Decision may be liable to be set aside upon judicial review if it involves jurisdictional error: *Plaintiff S157/2002 v The Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476; (2003) 77 ALJR 454; (2003) 195 ALR 24; (2003) 72 ALD 1 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. An error by the Tribunal may only constitute jurisdictional error if the Tribunal:
 - a) identifies a wrong issue;
 - b) asks the wrong question;

- c) ignores relevant material; or
- d) relies on irrelevant material,

11. in such a way that the Tribunal's exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the powers given to the Tribunal under the *Migration Act: Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323; (2001) 75 ALJR 1105; (2001) 180 ALR 1; (2001) 62 ALD 225 at [82] per McHugh, Gummow and Hayne JJ.

12. The Tribunal Decision may also be tainted by jurisdictional error where there is a denial of procedural fairness as expressly required by the terms of the *Migration Act: SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152; (2006) 81 ALJR 515; (2006) 231 ALR 592; (2006) 93 ALD 300 ("SZBEL"), or by legal unreasonableness: *Minister for Immigration & Citizenship v Li & Anor* [2013] HCA 18; (2013) 249 CLR 332; (2013) 87 ALJR 618; (2013) 297 ALR 225; (2013) 138 ALD 181 ("Li").

Legislative Framework

13. PIC 4020 reads as follows:

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

...

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular
means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Ground 1A

14. Ground 1A of the Amended Judicial Review Application is as follows:

1A. The Migration Review Tribunal (“tribunal”) made a jurisdictional error in considering whether there was evidence before it that the First Applicant had “Given or caused to be given,” within the meaning of that expression in clause 4020(1) of Schedule 4 to the Migration Regulations 1994 (Cth), a bogus document in relation to the application for the Regional Employer Nomination (Permanent) visas lodged with the Minister’s department (“Department”) on 29 July 2013.

Particulars

The First Applicant gave to her then migration agent, Susela Nair (“Agent”), a diploma certificate (“Diploma”) (CB 49) in connection with an earlier visa application lodged with the Department on 5 November 2012 (CB 154) and withdrawn on 10 June 2013 following the Department’s identification of the Diploma as a bogus document (CB 169).

The First Applicant expressly instructed the Agent to lodge the present visa application without inclusion of the Diploma and without reference to it in the application (CB 364).

The Agent included the Diploma with the present visa application through the Agent's administrative error (CB 364), a fact accepted by the Tribunal (CB 447, [14]).

The Tribunal's findings that the First Applicant:

was indifferent to what was in fact lodged ([16]); and

had caused to be given a bogus document to the Department ([17]) were not reasonably open to the Tribunal on the evidence before it.

15. It was not in contention that the Diploma was a “bogus document”. What was in contention was whether the applicants had “caused to be given” the Diploma in relation to the present REN Visa application.

Applicants' Submissions

16. The applicants submitted as follows:

- a) it was not in dispute at the Tribunal Hearing that:
 - i) a bogus document had been provided to the Delegate with the visa application; and
 - ii) the applicants' migration agent had provided the document to the Department through administrative error (Tribunal Transcript, pages 4-5);
- b) the Tribunal made a jurisdictional error in finding that the applicants had caused to be given a bogus document to the Department: CB 447 at [17];
- c) the principles applicable to this case are discussed in *Sran v Minister for Immigration & Anor* [2014] FCCA 37; (2014) 283 FLR 391 at [110]-[118] (“*Sran*”) per Judge Nicholls and *Trivedi v Minister for Immigration & Border Protection* [2014] FCAFC 42; (2014) 220 FCR 169; (2014) 141 ALD 252 at [29]-[44] per Buchanan J (“*Trivedi*”);
- d) the applicants also rely on the general principles of agency, namely that it is the terms of the agency, as agreed between principal and agent, which dictate the scope of the agent's authority and where an agency agreement is in writing, the scope

of the actual authority is ascertained by reference to both the express words of the agreement (express actual authority) and any proper implications to be drawn from those words: *Upjohn v Illingworth* (1982) 29 SR (NSW) 4 at 7 per Street CJ;

- e) in the present matter, the question is whether the applicants “caused” the migration agent to “give” the Diploma and the answer to that question depends on whether the migration agent acted within the scope of the authority given by the applicants;
- f) the Tribunal found that the applicants gave a “broad scope of authority” to the migration agent and went on to note that the applicants had instructed that the Diploma not be included, but that Ms Dhanuka was indifferent to what in fact was lodged;
- g) the question for the Court is whether those findings were reasonably open to the Tribunal on what was before it, and whether in making these findings the Tribunal otherwise fell into legal error such that it could be said it failed to exercise its jurisdiction;
- h) the Tribunal’s finding that the migration agent acted within the “broad scope” of the authority given was not open to the Tribunal on the facts otherwise accepted that:
 - i) the applicants had instructed the migration agent not to lodge the Diploma with the second application;
 - ii) the Diploma was lodged by an employee of the migration agent in error; and
 - iii) it was logical that the applicants would not have provided the Diploma a second time;
- i) under the law of agency, the authority given by the applicants to the migration agent was to lodge a REN Visa application which did not include the Diploma. Ms Dhanuka did not rescind the instruction not to lodge the Diploma by not checking the REN Visa application documents before they were lodged;

- j) the preparation and final checking of the REN Visa application was the responsibility of the migration agent and that the applicants did not check the REN Visa application before it was lodged did not vary the scope of the authority given to the migration agent;
- k) as noted by Buchanan J (with whom Allsop CJ and Rangiah J agreed) in *Trivedi* at [32], PIC 4020 is not directed to innocent, unintended or accidental matters and the inclusion of the Diploma with the REN Visa application was of that nature;
- l) the flaw in the Tribunal's reasoning is that it visited the consequences of the creation of the Diploma, through applying PIC 4020, upon the accidental subsequent provision of the Diploma by the migration agent's mistake in an REN Visa application that had no connection to the REN Visa application which had previously been withdrawn; and
- m) when regard is had to all of the circumstances of the lodgement of the Diploma as well as the legal authorities, the Tribunal's finding that the Diploma was "caused" to be given by Ms Dhanuka was one that was not reasonably open to it.

17. The submissions filed after the hearing in response to *Gill* are as follows:

- a) it is clear from *Gill* that a general authority given to an agent (including as a result of the visa applicants' indifference) has its limits and in *Gill*, these limits were transgressed when the migration agent used unlawful means to achieve the visa applicants' objective';
- b) the authority Ms Dhanuka gave her migration agent was narrower than a general authority and ought to be characterised as an authority to lodge an REN Visa application but not to lodge the Diploma;
- c) the fact that the migration agent lodged the Diploma by an accidental act was in contravention of Ms Dhanuka's express instructions and if an unlawful act by a migration agent is recognised to be beyond the authority given by a visa applicant,

then all the more the accidental, unauthorised act of the migration agent in the present case ought to be seen to be beyond Ms Dhanuka's authority such that it could not be said that the applicants had given, or caused to be given, the Diploma;

- d) while the facts in the present proceedings are unique, the obiter in *Gill* is instructive to the extent that the Court considered that there were limits to the migration agent's imputed authority and in what circumstances an applicant may be said to be "indifferent";
- e) the thrust of the argument is that the Tribunal erred in applying PIC 4020, and thereby visiting the consequences of the creation of a bogus document and such being provided to the Delegate:
 - i) as a result of the migration agent's mistake;
 - ii) contrary to the applicants' clear authority to the migration agent;
- f) in *Gill*, the Court found that an applicant was entitled to expect that a registered migration agent to whom an applicant pays the appropriate fee will perform their duties as a migration agent in accordance with the *Migration Act* and the Migration Agents Code of Conduct and it is not apt or correct to apply the description of "indifference" to a person who has retained a migration agent to perform his or her work;
- g) the description of "indifference" ought not to apply where a migration agent had made a mistake in lodging a document which the migration agent had been instructed not to lodge and therefore there is no basis for the Tribunal's finding that the Diploma was submitted due to an error by the migration agent and the applicants' "apparent indifference";
- h) the Tribunal's finding of "indifference" led to the Tribunal's subsequent finding that a broad scope of authority had been given to the migration agent and that the applicants were "indifferent to what in fact was lodged.", and by making such a finding, the Tribunal had committed jurisdictional error.

18. At hearing, Counsel for the applicants submitted:

- a) the agreement between the applicants and their migration agent was an “agreement for services” which included the service of preparing and lodging an REN Visa application;
- b) it is not in dispute that Ms Dhanuka doctored the Diploma out of naivety and desperation to ensure she secured her dream job;
- c) the migration agent returned the hard copy of the Diploma but there was an electronic copy which was inadvertently not deleted and was included in the application;
- d) the Tribunal never made an actual finding on the scope of authority that was given to the migration agent, rather it just referred to the “broad scope”;
- e) an applicant who engages a migration agent should not have to micromanage, and the scope of the agreement contemplates that the migration agent should not have to provide a copy of all the documents to an applicant before they are lodged;
- f) the circumstances in this case are not identical to *Sran* and *Trivedi* and what distinguishes them is that there is no reason to doubt there was an agency agreement. *Sran* and *Trivedi* provide useful statements of law but applying that law to the applicants’ circumstances led to the Tribunal falling into error in the way it addressed whether the applicants had “caused to be given” a bogus document;
- g) the application of “caused to be given” depends on whether the agency agreement was broad enough to include the agent giving the Diploma when lodging the REN Visa application and on no reading of PIC 4020 could it be said that the applicants did cause the Diploma to be given as what happened on the first occasion (with the withdrawn application) was “quarantined” from the REN Visa application and the applicants expressly stated it was not to be included;
- h) there was no room for the Tribunal to consider the “indifference” of the applicants because plainly the applicants were not indifferent as they had given express instructions not to include

the Diploma and this delineated the scope of the authority which was to lodge an accurate REN Visa application;

- i) the scope of the migration agent's authority is not to be determined by what happens when the application is lodged or checking the application just prior to it being lodged as this is simply a "mechanical or administrative process";
- j) the Tribunal's finding that Ms Dhanuka was indifferent in not checking the final application before it was lodged is the "red herring" to the question of whether the applicants "caused" the Diploma to be given;
- k) if the Tribunal asked the correct question of whether there was an agency agreement and the scope of the agency agreement (as in *Sran*), the only conclusion reasonably open to the Tribunal was that the applicants did not cause the Diploma to be given;
- l) *Trivedi* suggests that PIC 4020 is not concerned with "accidental matters" and in this case the provision of the Diploma was accidental, notwithstanding that barriers had been put up to attempt to prevent the Diploma being included;
- m) in a pre-internet age the declaration at the end of the visa application may have had some force, however as explained in the migration agent's declaration to the Tribunal, the responses in the application form are pre-populated including the declaration; and
- n) if ss.98 or 101 of the *Migration Act* were considered by the Tribunal in finding Ms Dhanuka was "indifferent" then the Tribunal ought to have referred to it in its reasons, and ss.98 and 101 of the *Migration Act* bring in and contemplate the law of agency having application.

Minister's Submissions

19. The Minister submitted that:

- a) it must first be noted that the Tribunal's findings in relation to the authority are findings of fact and this Court cannot substitute its

own preferred finding in circumstances where the findings were reasonably open to the Tribunal and in this matter the Tribunal's findings were open for the reasons it gave and no jurisdictional error can be revealed by this ground;

- b) it is clear that the applicants' instructions, in re-engaging the migration agent to lodge the REN Visa application, were that the Diploma should not be submitted;
- c) the evidence indicates that, despite the instructions given by the applicants, they were ultimately indifferent to what was, in fact, lodged with the REN Visa application and the evidence in support of this included:
 - i) the applicants asked the migration agent to lodge the REN Visa application: CB 242 at [78];
 - ii) the applicants did not complete the REN Visa application: CB 362 at [42] and [44];
 - iii) the applicants did not check the content of the REN Visa application prior to it being lodged: CB 362 at [44];
 - iv) the applicants expected the migration agent to take care of completing the REN Visa application and knew that the REN Visa application was to be submitted on their behalf; and
 - v) the REN Visa application was lodged on 29 July 2013: CB 22-37;
- d) the Tribunal's finding in relation to the applicants' indifference in relation to what was lodged with the REN Visa application was open to it and the Tribunal's findings of such indifference provided the answer to the argument that Ms Dhanuka did not authorise the making of an REN Visa application that included the Diploma;
- e) the applicants' reliance on *Trivedi* is misguided and the passages referred to by the applicants relate to the purposeful falsity of the evidence in question rather than the circumstances in which such

purposely false documents are provided. It was in the context of purposeful falsity that it was found that an element of fraud or deception was necessary in order to attract the operation of PIC 4020;

- f) it was open to the Tribunal on the evidence before it, including the applicants' concessions, to find that the Diploma was a bogus document and the information was false, and in so doing, the Tribunal in effect found that the document was "purposely untrue"; and
- g) the mere submission of a bogus document is sufficient to attract the operation of PIC 4020.

20. In respect of the decision in *Gill*, the Minister submitted:

- a) the circumstances in *Gill* were very different to the circumstances in this proceeding. Contrast here, where the applicants do not allege any fraud on the part of their migration agent, do not assert the REN Visa application was invalid, and do not seek any declaratory relief about the validity of the REN Visa application;
- b) in the absence of any fraud on the part of the migration agent, and no challenge by Ms Dhanuka to the validity of the REN Visa application, the fact that the REN Visa application was supported by a bogus document means that Ms Dhanuka fails to satisfy PIC 4020;
- c) in *Trivedi*, it was held that PIC 4020 did not disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them, but that different question arose where the information or documents provided in support of an application are revealed as false, in the purposefully untrue sense of that term and that PIC 4020 is directed to information or documents which are purposely untrue; and
- d) accordingly, the decision in *Gill* does not affect the Tribunal's finding in this proceeding that Ms Dhanuka does not meet PIC 4020(1).

21. At hearing, the Minister submitted:

- a) the issue in this ground for determination is whether there was a jurisdictional error in the Tribunal finding that it could not be satisfied that there was no evidence before it that the applicants had given or caused to be given a bogus document;
- b) the REN Visa application was not only accompanied by a bogus document, but it also contained information that was false or misleading in a material particular as reference to the Diploma is made in the “Qualifications” to the course the subject of which was the “bogus document”;
- c) the scope of the agreement with the applicants and migration agent was to prepare and lodge the REN Visa application and that did not remove the obligation on the applicants to check the REN Visa application;
- d) the REN Visa application contained a declaration that the applicants read and understood that the information in the application was complete and correct and in light of that declaration (albeit electronic) it cannot be said it was not reasonably open for the Tribunal to conclude that the applicants were “indifferent” to what was lodged; and
- e) if, as appears to be the case here, an applicant does not review the visa application and the supporting documents so as to be able to comply with the declarations that are required to be made by applicants, then there is a clear basis for the Tribunal to find that an applicant was indifferent to what was lodged and within the context of PIC 4020 can be concluded to have either given or caused to be given a bogus document.

Consideration

22. Ms Dhanuka has not claimed any fraud on the part of the migration agent and does not contend that the REN Visa application is invalid. In *Gill*, the Court distinguished between the questions arising in that case and those that arose in *Sran* at [60] per Judge Nicholls. Here the Court is not being asked to decide a jurisdictional fact for itself, rather it is being asked to determine if there is an error in the fact finding of the

Tribunal itself. The applicants' case is more apt to the circumstances and principles discussed in *Trivedi* and *Sran*.

23. The relevant passages of *Trivedi* at [32], [43] and [49] per Buchanan J are as follows:

32. It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a "public interest" criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application. I would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

...

43. In my view, it is not necessary (for reasons yet to be further developed) to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact.

...

49 For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the

administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.

24. The relevant parts of the Tribunal Decision at CB 448 at [15]-[16] are as follows:

15. The representative has argued that in providing the bogus document the former migration agent had exceeded her authority. The representative submits that because the applicant did not physically give the document, the question to be asked is whether the applicant caused to be given the bogus document. He argues that given her instruction to her agent that it not be provided with the second application, then the agent, through the accidental submission by her office, has acted outside the scope of her authority.

16. The Tribunal finds the applicant gave authority to the migration agent to lodge a visa application for her. That was the broad scope of the authority given to the agent. Whilst the applicant was not 'indifferent' as to what would be included in the application (ie she instructed the bogus document not be included), she was indifferent to what in fact was lodged. That is, she did not review the final application before its lodgement.

17. The Tribunal finds a bogus document was given to the Department and was caused to be given by the applicant when she engaged a migration agent to prepare and lodge her visa application. Thus even whilst accepting its inclusion was by mistake, the Tribunal cannot be positively satisfied there is no evidence that the applicant has given, or caused to be given, a bogus document to the Department with this visa application.

25. Contrary to the applicants' submission, the Tribunal did make a finding on the scope of authority given to the migration agent. The scope was a "broad" scope to prepare and lodge the REN Visa application. That finding was open to be made as that was the express terms of the "Agreement for Migration Services": CB 382. The instruction given by Ms Dhanuka not to include the Diploma was made in the context of the migration agent having been given the broad scope of authority to prepare and lodge the REN Visa application. The Court does not accept that the instruction not to include the Diploma in the application

amounts to the migration agent exceeding the authority given, as the Tribunal found, as a matter of fact, that the authority was to prepare and lodge the REN Visa application. At its highest, the failure to follow the applicants' instruction amounted to negligence, or incompetence, in the migration agent exercising the authority to prepare and lodge the REN Visa application. That does not constitute jurisdictional error: *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189; (2007) 81 ALJR 1401; (2007) 237 ALR 64 at [45] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

26. Ms Dhanuka was "ultimately responsible": *Trivedi* at [49] per Buchanan J, for what was included in the REN Visa application. The declaration at the end of the REN Visa application: CB 17, whether it was pre-populated or otherwise, is plain in its purpose to, consistent with the scheme of the *Migration Act* and in particular ss.98 and 101 of the *Migration Act*, place the onus or responsibility on an applicant to ensure the integrity of their REN Visa application and the veracity of the information and documents provide in support: *Trivedi* at [49] per Buchanan J.
27. The applicants' placed some emphasis on the fact that in circumstances where an application for a visa is made electronically, the weight to be given to the "declaration" that information is true and correct should not be as if it was a "paper form" where an applicant has themselves signed by hand the document. The relevant form the applicants' completed in this case was Form 1408 (Internet). That form was a form approved in IMMI 15/032, and there is nothing to suggest the integrity of that form, or the content therein, should be treated any differently to a "paper form". If that were the case the inclusion of the declaration in any application would be rendered otiose.
28. The core finding of the Tribunal was that the applicants' indifference had led it to not be satisfied there was "no evidence" that the applicants had not caused the Diploma to be given. Specifically, in the Tribunal's view, it was a result of the "indifference" of Ms Dhanuka to what was, in fact, lodged (having accepted that she was not indifferent to what should be included). The Tribunal based this on the fact that Ms Dhanuka did not review the application before it was submitted. To

the extent *Gill* discusses “indifference”, the following at [42] per Buchanan J is of note:

42. Taking into account the detailed regulatory scheme established for migration agents under the Migration Act and the Migration Agents Regulations, including the Code of Conduct, in our opinion, it is not apt or correct to apply the description of “indifference” to a person who, having retained an agent to apply for a visa and having paid the appropriate fees to that agent, leaves the migration agent to perform his or her work. It is certainly not apt to describe a person in these circumstances as indifferent to the subsequent submission of a fraudulent visa application by the migration agent without further relevant findings concerning the nature and scope of that indifference.

29. The Tribunal did make findings as to the nature and scope of the indifference: namely, that there was indifference by Ms Dhanuka as to what was actually lodged in the REN Visa application: CB 448 at [16]. On that basis it was open to the Tribunal to consider whether this indifference caused it to not be satisfied that the applicants had not caused the Diploma to be provided.
30. What the applicants overlook is that the Tribunal has not concluded that it was satisfied that Ms Dhanuka had *caused to be given* a bogus document, but that there was no evidence that Ms Dhanuka *had not* caused to be given the bogus document. The Tribunal was required to be “positively satisfied” that there was no evidence that Ms Dhanuka had caused the Diploma to be given. Simply, the Tribunal has reasoned that accepting everything to the benefit of Ms Dhanuka as to how the Diploma came to be included, the circumstances before the Tribunal included that Ms Dhanuka had been responsible for the creation of the Diploma in the first place and that Ms Dhanuka had not checked the REN Visa application prior to lodgement.
31. The Tribunal’s finding that a broad scope of authority was given to lodge the REN Visa application and that Ms Dhanuka was “indifferent” to what was actually lodged clearly indicates that it was reasonable for the Tribunal to conclude that there was not “no evidence” Ms Dhanuka had caused the Diploma to be given. There must simply be no evidence Ms Dhanuka has caused to be given a bogus document, or, in reference to *Trivedi*, no evidence that the bogus document was included other

than because of innocent error. As explained, the Tribunal was of the view that it was not an innocent error as it was of the view that Ms Dhanuka was “indifferent”.

32. A relevant inquiry as to whether PIC 4020 is engaged, and in particular whether a document is caused to be given, is whether an applicant bore responsibility for the provision of the document. If it can be said that an applicant bore some responsibility, then there cannot be “no evidence”. In this case the Tribunal was of the view that the applicants indifference to what was in fact lodged meant that it could not be satisfied that the applicants had not caused the document to be given.
33. While another Tribunal may have come to a different view as to whether Ms Dhanuka was indifferent, the Court is satisfied that it was open to the Tribunal to reason that the applicants’ (and Ms Dhanuka in particular) were indifferent and that this indifference to what was, in fact, lodged was sufficient for it not to be positively satisfied that there was no evidence a bogus document had been caused to be given. It was ultimately a matter of fact for the Tribunal to determine that it was positively satisfied that there was no evidence the applicants had caused the Diploma to be given. It was therefore open for the Tribunal to consider that the applicants’ indifference to what was in fact included meant that the Tribunal could not be satisfied there was “no evidence”.
34. Ground 1A is not made out and does not establish jurisdictional error in the Tribunal Decision.

Ground 5A

35. Ground 5A of the Amended Judicial Review Application is as follows:

The Tribunal made a jurisdictional error by making an adverse finding of fact that it did not put to the applicant for comment during the hearing or subsequently, in breach of sections 359A and 359AA of the Migration Act 1958, alternatively the rules of procedural fairness.

Particulars

- (a) *In its decision the Tribunal made a finding of fact at [23] that “the business employs 18 other jewellers, amongst*

whom there would surely be another candidate for up skilling in the diamond grading”;

- (b) This finding supported the Tribunal’s adverse finding at [24] that “the Tribunal is not persuaded that the loss of the applicant to the business is a compelling circumstance affecting the interests of Australia”;*
- (c) The Tribunal’s assertion that there would surely be another candidate for “up skilling in the diamond grading” was not put to the First Applicant nor to the witness Mr Greene, the executive chairman of the employer company.*

Applicants’ Submissions

36. The applicants submitted that:

- a) in its decision the Tribunal made a finding of fact at CB 449 at [23] that supported the Tribunal’s adverse finding at CB 449 at [24] that the loss of Ms Dhanuka to the business was not a compelling circumstance, also supported by an assertion that there would “surely” be another candidate for “up skilling in the diamond grading” yet this was never put to the applicants or the witness;
- b) the applicants put forward detailed submissions as to how the requirements of PIC 4020(1) should be waived on account of compelling circumstances affecting the interests of Australia and having been aware that the business employs 18 other jewellers, it was incumbent on the Tribunal to invite Ms Dhanuka or Mr Greene to comment on its view that one of those persons could be trained to fill the Ms Dhanuka’s role;
- c) the assertion that Ms Dhanuka’s role could be filled by upskilling another employee was “information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review” for the purposes of ss.359A and 359AA of the *Migration Act* and was related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence;
- d) another basis on which the Tribunal was obliged to notify Ms Dhanuka or her employer of its view that another of the

18 jewellers employed by the business could be upskilled to fill Ms Dhanuka's role is that of procedural fairness;

- e) the Delegate in the present matter did not address the question of compelling circumstances that affect the interests of Australia, because it was said that the submission of Ms Dhanuka did not address that consideration and at the Tribunal hearing, Ms Dhanuka was not on notice that her loss to the business did not give rise to "compelling circumstances that affect the interests of Australia" because another employee could be upskilled; and
- f) accordingly, procedural fairness required the Tribunal to notify the applicants of that view and invite comment on it.

37. At hearing, the applicants' Counsel submitted that:

- a) it is not the number of jewellers the applicants take issue with, rather the conclusion that there would be candidates from those jewellers that could be "upskilled";
- b) Ms Dhanuka claimed her high level skill as a jewellery designer was indispensable to her employer, and gave evidence that a "jeweller" was a metal worker who puts the jewellery together but her role as a designer was to exercise creative skills;
- c) Ms Dhanuka's role was a specialist role and the Tribunal was not even sure that another individual could be "upskilled", and therefore if not a breach of ss.359A or 359AA of the *Migration Act* then procedural fairness still required the Tribunal to put this to the applicants or the witness; and
- d) there was information before the Tribunal that Ms Dhanuka's employer was one of only 12 companies distributing Argyle pink diamonds, and that Ms Dhanuka was expressly asked to partake in a training session by the wholesale supplier and, therefore, the interest of Australia, insofar as PIC 4020(4)(a) of the *Migration Regulations* refers, required the Tribunal to consider this and it does not do so when making the findings on the impact of Ms Dhanuka not being granted the REN Visa.

Minister's Submissions

38. The Minister submits that:

- a) the only “information” pointed to by the applicants in this ground is in relation to the business employing 18 other jewellers, and the term “information” does not extend to the Tribunal’s subjective appraisals or doubts in relation to that evidentiary material, including the consideration that Ms Dhanuka’s role could have been filled by upskilling another employee;
- b) the relevant “information” pointed to was not required to have been formally put to Ms Dhanuka under ss.359A or 359AA of the *Migration Act* in circumstances where Ms Dhanuka gave it for the purpose of the application for review: *Migration Act*, s.359A(4) (b);
- c) Ms Dhanuka appears to place reliance on the matters of *Awadallah v Minister for Immigration & Border Protection & Anor* [2015] FCCA 3126 and *Paul v Minister for Immigration & Multicultural Affairs* [2001] FCA 1196; (2001) 113 FCR 396; (2001) 64 ALD 289, however, both cases are distinguishable from the present matter as both involved circumstances in which applicants had not given the relevant information to the Tribunal; and
- d) it cannot be maintained that Ms Dhanuka was denied procedural fairness in circumstances where:
 - i) the applicants were aware, by virtue of the Delegate’s Decision, that the issue of compelling circumstances arose for consideration in the matter: CB 170;
 - ii) the applicants were advised, at the Tribunal hearing, of the relevant issue arising in the application, namely whether they met any of the limited circumstances in which PIC 4020 could be waived; and
 - iii) the Tribunal directly raised with Ms Dhanuka at the Tribunal hearing the difference between a jeweller and a jewellery designer, that the company had other employees and queried

“so why do you say your position is of a compelling nature”: Tribunal Transcript, page 6.

39. At the Tribunal hearing the Minister submitted that the matters raised as to this ground go to the Tribunal’s reasoning as opposed to “information” attracting the operation of ss.359A or 359AA of the *Migration Act*.

Consideration

40. The impugned paragraphs of the Tribunal’s Decision at CB 449 at [23]-[24] are as follows:

23. The Tribunal accepts the applicant is valued by her employer and that he has invested time and money in training her. Mr Greene claims the applicant's talent as a designer and her ability to communicate with diamond manufacturers in India, given her a specialised set of skills and make her an important part of the growth of the business. However, as conceded by the employer, the business will go on without the applicant. Whilst Mr Greene particularly values the applicant's experience in grading diamonds, the Tribunal notes there will remain 2 people in the organisation who also have this skill and experience. That the employer chose to spend 2 years training someone who held only a temporary visa at that time, is a decision for the employer to make. The Tribunal notes the business employs 18 other jewellers, amongst whom there would surely be another candidate for up skilling in diamond grading.

24. The Tribunal is not persuaded that the loss of the applicant to the business is a compelling circumstance. The loss of employees, even highly skilled employees, is an ordinary aspect of running a business. Likewise, the ongoing need to hire and train new employees and grow them for management positions, as the employer did with the applicant, is an ordinary part of business. Further, even if the Tribunal was persuaded the importance of the applicant remaining in the business amounted to a compelling circumstance, it is not satisfied it would amount to a compelling circumstance affecting the interests of Australia. The Tribunal is not satisfied the company Solid Gold Jewellers would be so adversely affected by the loss of the applicant that any effect on business would also affect the Argyle diamond trade or have any adverse effect on Australian trade or otherwise affect the interests of Australia.

41. The Court accepts the Minister’s submissions that the “information” it was suggested had to be put to Ms Dhanuka or her employer was information which fell within the exceptions of ss.359A(4)(b) and 359AA(4)(b) of the *Migration Act*. The “information” was information that Ms Dhanuka had supplied for the purposes of the review application, in the sense that it was volunteered by Ms Dhanuka’s employer in the course of answering the Tribunal’s questions: *VWBF v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 851; (2006) 154 FCR 302 at [48] per Heerey J. While the Court accepts that the information was, in a sense, referred to by the Tribunal in a context removed from that which it was offered, it was nevertheless provided by Ms Dhanuka in the course of the review and it was for the Tribunal to choose how it used that evidence. Further, ss.359A and 359AA of the *Migration Act* do not require a Tribunal to put to an applicant, or alert the applicant, to the subjective appraisals of the information offered or its “prospective” reasoning in relation to that information: *SZTGV v Minister for Immigration & Border Protection* [2015] FCAFC 3; (2015) 229 FCR 90; (2015) 318 ALR 450; (2015) 144 ALD 525 at [18] Perram, Jagot and Griffiths J. Therefore, to the extent it was argued there was a breach of ss.359A or 359AA of the *Migration Act*, that is not established.
42. The other aspect of this ground refers to an error which the Court understands to be of a kind identified in *SZBEL*. The Court does not accept such an error occurred because:
- a) Ms Dhanuka was clearly on notice from the Delegate’s Decision that a determinative issue was that she had not satisfied the “compelling” circumstances criterion;
 - b) at most, the Tribunal’s comment at CB 449 at [23] was a “factual matter” that went to the ultimate issue (of whether there were “compelling circumstances”), and was thus not required to have been put or communicated to Ms Dhanuka: *SZJUB v Minister for Immigration and Citizenship* [2007] FCA 1486 at [25] per Bennett J;
 - c) were the Tribunal to have communicated to Ms Dhanuka or her employer what it was, or how it was assessing or using the evidence that was given, it would amount to the Tribunal giving a

running commentary on what it thinks about the information that was given to it for the purposes of the review: *Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162; (2007) 163 FCR 285; (2007) 243 ALR 691 at [88]–[89] per Emmett, Weinberg and Lander JJ; and

- d) the Tribunal did say to Ms Dhanuka “So if you were not able to get this visa, there would still be two other people in the company who can grade diamonds, and three other jewellery designers. So why do you say your position is of a compelling nature”: Tribunal Transcript, page 6. It can be inferred from such a question that the Tribunal was suggesting that there were other persons who could do the work that she undertakes.

43. What the applicants have sought to do in this ground is to isolate one comment at CB 449 at [23] from the context of CB 449 at [23]–[24] as a whole. That the Tribunal noted that there were 18 other employees who may be “upskilled” was not a critical part of the Tribunal’s reasoning process that led to the adverse finding at CB 449 at [24]. The critical parts of CB 449 at [23] were that Ms Dhanuka’s own employer had conceded the business would go on without her and that there were two other persons who possessed the same skill and experience of Ms Dhanuka. The Tribunal’s comment in the latter part of CB 449 at [23] was an observation, in circumstances where the employer had trained Ms Dhanuka, that were it the case that it was necessary for someone to be trained to Ms Dhanuka’s level (which on the employer’s evidence it was not), then there was on the information provided by Ms Dhanuka, 18 other jewellers in the organisation.

44. Ultimately, it does not matter if the Tribunal did, in fact, err in respect of the comment it made at CB 449 at [23] as it went on at CB 449 at [24] to address the fact that even if it did accept that Ms Dhanuka’s loss to the business was compelling it would not have accepted that it would amount to a compelling circumstance that affected the interests of Australia. It was not enough for Ms Dhanuka to satisfy the Tribunal that her not being granted the REN Visa was a compelling circumstance because of the effect on her employer, it was that her circumstances were compelling because they affected the interests of Australia. That was what she had to satisfy the Tribunal of, and that

was what the Tribunal was considering in the context of CB 449 at [23]-[24].

45. The conclusion that compelling circumstances affecting the interests of Australia are not demonstrated by reason of the departure of a specialist jewellery designer from a jeweller in Perth demonstrates no error, factual, legal or jurisdictional, especially when regard is had to the meaning of “the interests of Australia” as connoting a more significant, objective and public interest than that associated with employment in a Perth jeweller: *Re Minister of Immigration, Local Government & Ethnic Affairs v Roberts* (1993) 41 FCR 82 at 87 per Einfeld J, which was cited with approval in *Lin v Minister for Immigration & Citizenship & Anor* [2009] FCA 494; (2009) 176 FCR 371 at [94] per Foster J. In short, the Tribunal considered the issue to be determined by reference to the correct questions and had regard to all of the relevant material, both legal and factual. It arrived at factual conclusions with respect to the issue of whether or not there were established the relevant circumstances sufficient to warrant granting the applicant the REN Visa and determined that it was not satisfied that such circumstances had been established: *Migration Act*, s.65. Thus, when regard is had to all of the circumstances of the Tribunal’s consideration, and the manner in which this aspect of the Tribunal Decision was arrived at, namely that the correct issue was identified, the correct questions were asked, and relevant material and information was taken into account, this aspect of the Tribunal Decision was a decision made within power by the Tribunal and which evinces no jurisdictional error.
46. Ground 5A is not made out and does not establish jurisdictional error in the Tribunal Decision.

Ground 7A

47. Ground 7A of the Amended Judicial Review Application is as follows:

7A. The Tribunal made a jurisdictional error by making an adverse finding of fact that it did not put to the applicant for comment during the hearing or subsequently in breach of sections 359A and 359AA of the Migration Act 1958, alternatively the rules of procedural fairness.

Particulars

In its decision the Tribunal found at [28] that “the Tribunal considers support from afar can continue if the applicant is offshore”;

At [31] the Tribunal found that “even should the applicant not remain, Mr Dhanuka and Ms Asampuria will have each other for emotional support”;

Both of these findings underpinned the Tribunal’s conclusion at [33] that it “is not satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen”;

Neither of these findings were put to the First Applicant nor Mr Dhanuka and Ms Asampuria for response.

Applicants’ submissions

48. The applicants submitted that:
- a) Ms Dhanuka was not put on notice of the Tribunal’s view that if the REN Visa were not granted and she would be required to leave Australia, her brother and sister will have each other for emotional support; and
 - b) the Delegate did not address these issues and the Tribunal Transcript demonstrates that the Tribunal member received oral evidence from Ms Dhanuka in relation to compelling or compassionate circumstances affecting her sister and brother yet did not put to the applicants for comment the view that the brother and sister would have each other for support.

Minister’s submissions

49. The Minister submitted that:
- a) the relevant “information” in relation to this ground was not required to have been formally put to Ms Dhanuka under ss.359A or 359AA of the *Migration Act* in circumstances where Ms Dhanuka gave it for the purpose of the application for review by providing information that:

- i) Ms Dhanuka had been providing support for her sister whilst living in a different state;
 - ii) Ms Dhanuka and her brother and sister all lived in the same house so as to give each other support; and
 - iii) Ms Dhanuka, in effect, seeks merits review on the basis of the Tribunal's assessment of that information; and
- b) Ms Dhanuka was aware of the relevant issue arising for consideration and the Tribunal's findings were open to it for the reasons it gave.

50. At hearing, the Minister further noted that in the course of the Tribunal hearing Ms Dhanuka gave evidence on this matter thus it is information given by Ms Dhanuka in the course of the application and is therefore exempt from the operation of ss.359A and 359AA of the *Migration Act*.

Consideration

51. The relevant paragraphs in the Tribunal Decision at CB 449-450 at [27]-[28] and 450 at [31] are as follows:

27. The applicant claims her sister Rashi Asampuria relies on her for emotional and financial support. In a statutory declaration, Ms Asampuria declares she is an Australian citizen and is the eldest sister in the family. She came to Australia for an arranged marriage in 2010, however by October 2013 she had separated from her husband. Ms Asampuria has a three year old son. Ms Asampuria is living in Melbourne but has decided to move to Perth to be closer to her sister, and brother Rounak. She says the applicant will help look after her son whilst she returns to study. At the hearing the applicant added that her sister needs family support and all she has in Australia is the applicant and their brother. The applicant said as a boy their brother does not have much experience with children, so her sister needs her for help with the child. The applicant conceded that she has only seen her nephew in Melbourne a few times.

28. The Tribunal acknowledges Ms Asampuria has separated from her husband and is looking to re-establish her life with her son as a single parent. She has relied in the past on financial and emotional support from her sister from afar, as they lived in different parts of Australia. The Tribunal considers support from

afar can continue if the applicant is offshore. Ms Asampuria also has a brother in Australia, and although the parties claim he cannot help with her child because he is a boy with no experience of children, the Tribunal does not accept this. Ms Asampuria will still have a relative in Australia. She will also be entitled to the usual support given to single parents in Australia. The Tribunal does not accept her reliance to date on the applicant amounts to a compelling or compassionate circumstance that justifies the grant of the visa.

...

31. The Tribunal acknowledges the three siblings have enjoyed having each other for support in Australia. However, even should the applicant not remain, Mr Dhanuka and Ms Asampuria will have each other for emotional support. Even considered cumulatively, the Tribunal is not satisfied their reliance, emotionally and/or financially, on their sister the applicant is a compelling or compassionate circumstance that justifies the grant of the visa.

52. For the same reasons as ground 5A, ground 7A must fail. The information that Ms Dhanuka suggests should have been “put” was not “information” that fell within the purview of ss.359A and 359AA of the *Migration Act*. All of the information the Tribunal relied on to form its view was information that Ms Dhanuka had submitted herself, or her brother and sister had provided, in support of the review application. Therefore, these matters fell within s.359A(4)(b) or 359AA(4)(b) of the *Migration Act*.
53. To the extent it is argued that the Tribunal ought to have put to Ms Dhanuka or her brother or sister that they would have each other for emotional support, the Tribunal notes Ms Dhanuka as saying, at CB 449 at [27], that her sister needs family support and all she has in Australia is Ms Dhanuka and their brother. Ms Dhanuka herself, therefore, provided information that her sister would have her brother.
54. As for the Tribunal suggesting that Ms Dhanuka’s support can continue from afar, this is not a finding per se. The Tribunal did not solely reason that the circumstances were not compelling because the support Ms Dhanuka provided to her sister could be provided from afar (as it had previously been). Rather, the Tribunal reasoned that the circumstances were not “compelling” as:

- a) Ms Dhanuka could continue to provide assistance from afar;
- b) Ms Dhanuka's sister would still have support from the brother;
- c) Ms Dhanuka's sister would have the support offered to single parents in Australia; and
- d) The reliance the sister had had on Ms Dhanuka to date was limited.

55. It follows from the above that it was not that Ms Dhanuka could provide assistance from afar that was a part of the reason for finding the circumstances were not compelling, it was that the reliance of the sister on Ms Dhanuka to date that was not a compelling circumstance and that there was support for the sister were Ms Dhanuka to leave Australia.

56. Having put that information before the Tribunal, it was for the Tribunal to use that evidence and make findings of fact. How the Tribunal evaluates, appraises or reasons with the information that an applicant provides is a matter that is one for the Tribunal in its role as the finder of fact. That is what the Tribunal has done here. It has evaluated the information and evidence that was provided in support of the claim that there were compelling reasons to waive the requirement of PIC 4020 and formed the view that on the basis of that information and evidence it was not so satisfied. This was part of the Tribunal's fact finding function and the Court can identify no error in the Tribunal's conclusion.

57. Ground 7A is not made out and fails to disclose any jurisdictional error in the Tribunal Decision.

Ground 8A

58. Ground 8A of the Amended Judicial Review Application is as follows:

The Tribunal made a jurisdictional error by unreasonably exercising its discretion, under paragraphs (4)(a) and (b) of clause 4020, as to whether the requirements of paragraph (1)(a) of clause 4020 ought be waived.

Particulars

(a) *The First Applicant submitted and the Tribunal accepted that:*

the Diploma was sent accidentally with the present visa application and it was not the intention of the First Applicant that the bogus qualification be referred to in the application ([14]);

the First Applicant and the Agent would not resubmit an application including the Diploma and false information when they had taken steps to withdraw the previous application to avoid the consequences of not meeting clause 4020 ([14]).

(b) *Nonetheless in exercising its discretion adversely to the Applicant, the Tribunal found that the “nature of the fraud committed is serious indeed” ([32]).*

(c) *Upon the facts accepted by the Tribunal in paragraph (a) above, the result was unreasonable or plainly unjust, and accordingly the Tribunal fell into jurisdictional error.*

Applicants’ submissions

59. The applicants submitted that:

- a) the following propositions emerge from consideration of the subject matter, scope and purpose of the Minister’s power to refuse visa applications under PIC 4020:
 - i) PIC 4020 is not directed to innocent, unintended or accidental matters as per Buchanan J in *Trivedi*; and
 - ii) PIC 4020 is not directed to imposing a penalty for the breach of some obligation, but rather “seeks to ensure that an applicant for a visa truly fulfils the criteria for the visa”: *Vyas & Anor v Minister For Immigration & Anor* [2012] FMCA 92; (2012) 263 FLR 131 at [65];
- b) further, the Procedure Advice Manual (PAM) of the Department states at [26]:

When considering the compelling and/or compassionate circumstances presented by the applicant, delegates need to weigh the severity of the fraud committed by the applicant against the circumstances presented.

- c) the PAM instruction is relevant to the application of PIC 4020 due to the principle that the Tribunal is not bound to follow the Department's policy guidelines but should do so unless there are cogent reasons to the contrary;
- d) there is no question that Ms Dhanuka was trying to circumvent the requirement for her to truly fulfil the REN Visa criteria by submitting the Diploma as her qualifications met the REN Visa criteria without any need to resort to the qualification stated in the Diploma, thus this is not a case where Ms Dhanuka was seeking to undermine the integrity of Australia's migration program through providing a bogus document;
- e) as noted by the Tribunal, the Diploma was submitted due to an error by an employee of the migration agent. It was submitted against the clear instructions of the applicants; and
- f) in all the circumstances, including consideration of the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness, it is submitted that the Tribunal's exercise of the discretion was legally unreasonable.

60. At hearing, Counsel for the applicants' added:

- a) if the Court accepts the Tribunal erred as suggested in ground 1A there is no need to consider this ground, however in the event ground 1A is not accepted this ground presents an alternative;
- b) PAM required the Tribunal to consider the severity of the fraud and in this case the Tribunal did not properly consider the severity of the fraud;
- c) it was unreasonable for the Tribunal not to consider the PAM guide as it was directly applicable to the waiver provisions and the Tribunal did not weigh or consider the severity of the fraud in consideration of whether to waive PIC 4020;

- d) there is an inconsistency in the Tribunal's finding, namely that the Diploma was provided by mistake yet the nature of the fraud was "serious"; and
- e) the wrongdoing Ms Dhanuka partook in previously should not be visited upon her as a result of the negligence of her migration agent and it was unreasonable for the Tribunal to reason such way in the circumstances.

Minister's Submissions

61. The Minister submitted that:

- a) the unreasonableness test is a difficult test to meet and invalidation for unreasonableness should only occur in exceptional cases; and
- b) in this matter the Tribunal considered all of the evidence and submissions of the applicants and gave cogent reasons in relation to why it was not satisfied that the requirements of PIC 4020 should be waived and reached findings open to it on the available material.

62. The Minister's submissions at hearing were that it cannot be said that the Tribunal choosing not to waive PIC 4020 in light of its findings that the provision of the Diploma was accidental was unreasonable in the *Li* sense.

Consideration

63. It is clear that at CB 450 at [32] of the Tribunal Decision that the Tribunal considered the "severity" of the fraud. Therefore, to the extent the applicants suggest the Tribunal did not consider PAM and the severity of the "fraud" this must be rejected. The applicants' representative asked the Tribunal to consider PAM and the severity of the fraud and the Tribunal did so as follows:

32. The representative submitted that Department policy is that when decision makers are considering the compelling and/or compassionate circumstances presented by an applicant they need to weight the severity of the fraud committed against this. The representative submitted the Tribunal should do this and should

find that as the bogus document was provided in error this should weigh heavily in the applicant's favour. The Tribunal has considered that submission, but would come to a different conclusion to the one presented by the representative. That is, if the nature of the fraud is to be taken into account when assessing the compelling and/or compassionate circumstances raised, then it would not be in favour of the applicant. The nature of the fraud committed is serious indeed. The applicant fabricated a qualification. She only withdrew this when caught by the Department. Whilst accepting the provision of the bogus qualification was unintentional the second time, that does not negate the very existence of the bogus document is attributable to a fraudulent action and attempt to deceive by the applicant.

64. The Court does not consider there is any inconsistency in the Tribunal's finding that the Diploma was provided in error yet the nature of the fraud was "serious". The Tribunal explains why, despite the fact of the Diploma being provided unintentionally, it still considered the fraud serious: because the fraudulently created Diploma was entirely of Ms Dhanuka's making for the purpose of obtaining a REN Visa.
65. It was not unreasonable for the Tribunal to determine that the "fraud" was serious in circumstances where the original reason for the fraud was to deceive, and the reason for it being unsuccessful was merely because the fraud was discovered previously. In effect, the Tribunal reasoned that the Diploma existed for the purpose of deceiving the Department, and while it was not intentionally provide on this occasion, it was nevertheless created for the purpose of seeking to obtain a REN Visa based on fabricated material. It cannot be said that no reasonable decision-maker would not have come to the same conclusion on the same material and evidence. It also does not matter that the fabrication of the Diploma was not, on this occasion, for the purpose of circumventing the REN Visa criterion as Ms Dhanuka held the required qualifications in any event. In the Court's view, PIC 4020 carries an inherent "character" element. Plainly, it is against the public interest to grant a visa to a person who is attempting to undermine the integrity of the visa system and provide false information. While the provision of the Diploma with the REN Visa application was "accidental", the creation of the Diploma was not. It was the case that the previous application was only withdrawn "because", as the Tribunal found, it had been uncovered the document was bogus.

66. Accepting that the provision of the Diploma and the “fraud” on this occasion was unintentional, the nature of the fraudulent document was not unintentional. It was created for the purpose of bolstering a REN Visa application. Therefore, that the Tribunal considered the nature of the fraud as serious was something the Court considers was entirely open to the Tribunal to do. It cannot be said that a reasonable, fair minded individual could not have reasoned to the same conclusion on the same evidence: *Minister for Immigration & Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; (2010) 84 ALJR 369; (2010) 266 ALR 367; (2010) 115 ALD 248 at [128]-[132] per Crennan and Bell JJ. Likewise, the Court is satisfied that the Tribunal at CB at 350 at [32] has provided an evident and intelligible justification for its finding that the nature of the fraud was “serious” and that it would not weigh in favour of the Tribunal being satisfied that there were “compelling and/or compassionate circumstances”: *Minister for Immigration & Citizenship v Singh* [2014] FCAFC 1; (2014) 231 FCR 437; (2014) 308 ALR 280; (2014) 139 ALD 50 at [47] per Allsop CJ, Robertson and Mortimer JJ.
67. The area of decisional freedom the Tribunal has in determining whether there are compelling and/or compassionate circumstances in the context of PIC 4020 was not exceeded in this case.
68. Ground 8A is not made out and does not establish jurisdictional error in the Tribunal Decision.

Conclusion

69. The Amended Judicial Review Application has failed to establish any jurisdictional error in the Tribunal Decision, and must, therefore, be dismissed. There will be an order accordingly.
70. There will also be an order that the name of the Minister be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
71. The Court will hear the parties as to costs.

I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of Judge Antoni Lucev

Associate:

Date: 8 October 2019